No. 55.

Add'l Brf. of Baker for D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 55.

A. BACKUS, JR., & SONS, AND ABSALOM BACKUS, JR., PLAINTIFFS IN ERROR,

vs.

THE FORT STREET UNION DEPOT COMPANY, DEFENDANT IN ERROR.

ERROR TO SUPREME COURT OF MICHIGAN.

ADDITIONS TO BRIEF FOR DEFENDANT IN ERROR.

I.

To be added to that part of brief headed "Third answer" and extending from page 16 to page 42:

The Louisiana constitution of 1845 contains this provision:

"Nor vested rights be divested unless for purposes of public untility and for adequate compensation previously made."

Title VI, sec. 109.

The same provision is in all subsequent constitutions of Louisiana, the word "previously" being omitted from the provision in the constitution of 1868; it was restored in the constitution of 1879, and at the same time the following additional provision was adopted: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

1852—Title VI, sec. 105.
1864—Title VII, sec. 109.
1868—Title VI, sec. 110.
1879—Arts. 155, 156.

A statute for the expropriation of lands for railroads and other works of public utility was passed in 1855.

Acts of La., 1855, p. 32.
Rev. Stat. of La., 1856, p. 117.

It is still in force.

Rev. Stat. of La., 1870, p. 290.

The procedure prescribed is simple. The first or original assessment of the compensation or damages is made by a sheriff's jury, but either party can appeal to the supreme court, the effect of an appeal being controlled by the following section of the statute:

"SEC. 1483. Any appeal to the supreme court from the verdict of the jury and the judgment of the lower court, made by either party, shall not suspend the execution of such judgment, but the payment of the amount of the verdict by the company to the owner, or the deposit thereof, subject to the owner's order, in the hands of the sheriff, shall entitle the corporation to the right, title, and estate of the owner in and to the land described in the petition in the same manner as a voluntary conveyance would do. But in the event of any change being made by the final decree in the decision of the cause, the corporation shall be bound to pay the additional assessment or be entitled to recover back the surplus paid as the case may be."

Rev. Stat. of La., 1870, p. 291.

It has been held that the expropriation act of 1855 is not in conflict with the Louisiana constitution of 1879.

N. O. & Pac. R'y Co. *vs.* Robertson, 34 La. An., 865.

If the supreme court grant a new trial, the case is remanded to the court below, where it is again tried.

N. O. Pac. R'y Co. *vs.* Gay, 32 La. An., 471.

In a case where the supreme court itself on an appeal by the company reduced the damages the property-owner was required to pay the costs of the appeal.

Shreveport, etc., R'y Co. *vs.* Hollingsworth, 42 La. An., 749, 752.

The right of the property-owner in Louisiana to be paid the amount of the first or original award before the company takes possession is protected by the writ of injunction. This is shown by a case in which the opinion of the court was delivered by Justice White, now a member of the Supreme Court of the United States.

Gay *vs.* N. O. Pac. R'y Co., 32 La. An., 277.

The right to an injunction can be waived by laches in applying for relief.

Jefferson, etc., R'y Co. *vs.* New Orleans, 31 La. An., 478.

The statute provides that "the corporation shall be bound to pay the additional assessment," and it is apparent from the above cases that if it failed to do so the court would enjoin it and its assigns from making any use of the property, and if necessary would set aside the statutory conveyance resulting from the payment of the original award and restore the title and the possession to the owner.

The Ohio constitution of 1851 provides:

"No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law."

Art. XIII, sec. 5.

The statutes of Ohio provide for condemnation proceedings in the probate court, with a right in either party to file successive petitions in error in the court of common pleas, in the district or circuit court, and in the supreme court of the State. Pending proceedings in error, and the new trial or trials that may be granted thereon, the company is permitted to pay or deposit the first award, and the property-owner is permitted to receive it without prejudice to the proceedings in error.

The statutory provisions read:

"Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of and shall hold the property, rights, or interests so appropriated for the uses and purposes for which the appropriation was sought as set forth in the petition, and the judge shall enter of record an order to that effect, and, if necessary, proper process shall be issued to place the corporation in possession thereof."

1 Rev. Stat. Ohio, 1890, sec. 6433.

"Either party may file a petition in error in the court of common pleas of the proper county within thirty days from the rendition of the final judgment in the probate court, and the proceedings in error shall be conducted as in civil actions, but the corporation may on rendition of final judgment in the probate court pay into said court the amount of the judgment for compensation and costs therein rendered,

and proceed to enter upon and appropriate the property, notwithstanding the pendency of the proceedings in error."

Id., sec. 6437.

A general statute provides for petitions in error to the circuit (formerly district) court to review the judgments of the common pleas court.

Id., sec. 6709.

The same statute provides for petitions in error to the supreme court of the State to review the judgments of the circuit courts, and by leave of the supreme court or a judge thereof a petition in error may be filed in the supreme court to directly review a judgment of the common pleas or probate court.

Id., sec. 6710.

Costs are awarded on all these petitions in error as follows:

"When a judgment or final order is reversed the plaintiff in error shall recover his costs, and when reversed in part and affirmed in part the court may apportion the costs between the parties in such manner as it deems equitable."

Id., sec. 6727.

In *Meily vs. Zurmehly*, 23 Ohio St., 627, the railroad company paid the amount awarded by the jury in the probate court into court, and also filed its petition in error in the court of common pleas. The latter court affirmed the judgment of the probate court. The company then filed its petition in error in the district court. During the pendency of these proceedings in error the property-owner demanded the money on deposit with the probate judge, and payment being refused he brought an action against the probate judge on his official bond.

Held, that it was the duty of the probate judge to pay

the money over to the property-owner on demand, and that plaintiff was entitled to recover.

The court stated its conclusions on the construction to be given to the statute as follows:

"The statute seems to contemplate that when the corporation takes the land the owner shall have an equal right to have the amount adjudged to him therefor, and leaves each party the risk of any recovery, to which one may be entitled against the other, as a result of the proceedings in error."

It is settled law in Ohio that where a judgment has been collected or paid and it is subsequently reversed, the court has an inherent power to enter a judgment against the defendant in error for the money so collected or paid.

Bickett *vs.* Garner, 31 Ohio St., 28.

Hiler *vs.* Hiler, 35 Ohio St., 645.

It is a universal rule that where a money judgment has been collected and it is subsequently reversed on error, the judgment debtor can recover in an action, and if the facts appear of record he can have a judgment for restitution without being required to bring an action.

The common-law rule is stated by Holt, C. J., in *Anonymous*, 2 *Salk.*, 588:

"Where the plaintiff has execution and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears of record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias*, suggesting the matter of fact, viz., the sum levied, &c."

The rule is stated the same way upon the authority of the above case in Tidd's Pract., 1033, 1186. At page 1186 it is further said:

"If a man recover damages and have execution by *fieri facias*, and upon the *fieri facias* the sheriff sell to a stranger

a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff sold by command of the writ of *fieri facias*."

It was accordingly held by Justice Field at the circuit that a sale of real estate on execution would stand, but the money collected could be recovered on a reversal of the judgment.

South Fork Canal Co. *vs.* Gordon, 2 Abb., U. S., 479.

A summary order for a return of the money may be granted.

Exp. Morris, 9 Wall., 605.

Chancellor Walworth, in a case in New York, after stating the common-law rule, says:

"But I believe the modern practice has been to apply to the court on affidavit for leave to suggest the fact of record and upon which judgment of restitution is awarded."

Safford *vs.* Stevens, 2 Wend., 158, 165.

II.

To be added to that part of the brief headed "Fourth answer" and extending from page 42 to page 44:

Penn. Mutual Life Ins. Co. vs. Heisz, 141 *Ill.*, 35, is a case where the owners of lots abutting on a street recovered judgments against a railroad company for constructing a railroad with the consent of the municipality along the street.

The constitution of Illinois of 1870 provides:

"Private property shall not be taken *or damaged* for public use without just compensation. Such compensation when not made by the State shall be ascertained by a jury as shall be prescribed by law."

Art. 2, sec. 13.

There was no statute requiring a railroad company building in a street to institute condemnation proceedings to determine the damages it should pay to abutters.

Held:

(1.) That the abutters were not left without remedy, as they could by common-law action have their damages "ascertained by a jury," as prescribed by the constitution.

(2.) That the judgments obtained by the abutters against the railroad company were a first and paramount lien on the railroad constructed in the street, and that such lien was good as against any subsequent alienee or incumbrancer.

At page 62 the court said:

"It may be, as we have before seen it has been held, that the citizen is remediless until the damage has actually occurred, and by appropriate remedy he has determined the extent and amount thereof; but when the damages are ascertained in the mode provided by law, the right of the lot-owner to the payment of the same as compensation is guaranteed to him by the constitution as a condition to the continued appropriation of the street to the public use, whereby the injury to his private property is inflicted."

In a case in Pennsylvania, where the statute required the company to pay the award or tender adequate security therefor, and it had done neither of these things, although the compensation had been ascertained and a judgment rendered against the company in favor of the property-owner, it was held that the right of the owner to compensation was paramount to the rights of a corporation which had succeeded on a mortgage sale to all the property of the original company, and the succeeding company was required to pay the judgment against the prior company with interest.

West Penn. R. Co. *vs.* Johnston, 59 Pa. St., 290.

It has since been settled in Pennsylvania that where a railroad company gives a bond approved by the court as security for the compensation that the property-owner must look to the company taking his property and to the bond, even though the sureties subsequently become insolvent and the bond worthless.

Fries *vs.* South. Penn. R., 85 Pa. St., 73.
Hoffman's Appeal, 118 Pa. St., 512.
Wallace *vs.* R. R. Co., 138 Pa. St., 168.

In the case last cited the court, referring to the requirements of the Pennsylvania constitution of 1873, that the compensation must be first paid or secured, said:

"The legislature can grant the right to take private property for public use subject to these restrictions, and it has never been doubted that the legislature may prescribe the kind and character of the security to be given and the manner in which it shall be given. The power to so prescribe must be lodged somewhere else than in the parties immediately concerned, viz., the corporation and the property-owner, because they might never agree. The State has retained this power and has exercised it, and its right to do so will not, I think, be questioned."

Further on the court said:

"The only reasonable and therefore the true construction of the word 'secured' in the constitution is that it shall be made reasonably safe or sure that the owner of the property taken shall be able to collect the compensation for it, and the words 'sufficient sureties' in the act must be construed to mean such sureties as at the time they are taken make it reasonably certain that the owner of the property taken can collect from them a just compensation."

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